IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC85500**
	)	
CASEY POND,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
TWENTY-NINTH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM C. CRAWFORD, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Mr. Pond, Appellant, was convicted following a jury trial in the Circuit Court of Jasper County, Missouri, for statutory sodomy in the first degree, Section 566.062.[1] On August 26, 2002, the Hon. William C. Crawford, Judge, sentenced Pond as a prior offender, Section 558.016, to fifteen years imprisonment. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const.; section 477.060. This Court thereafter granted the respondent's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

[1] All statutory citations are to RSMo 2000 unless otherwise indicated. All Rule references are to Missouri Court Rules (2002), unless otherwise indicated.

STATEMENT OF FACTS

I. Pretrial matters

Mr. Pond was charged by amended information with statutory sodomy in the first degree, Section 566.062, for allegedly having deviate sexual intercourse in May, 2000, with A.S., who was less than twelve years old (L.F. 9-10).[2] He was also charged as a prior offender, Section 558.016 (L.F. 9-10). He had tendered a guilty plea to the felony unlawful use of a weapon on August 20th, 1999 (L.F. 9). He was sentenced on that alleged prior offense on May 26, 2000 (Tr. 14).

The alleged charged offense occurred the night before Pond was sentenced on that prior offense (Tr. 11, 169, 174, 434). As a result, Pond objected to his being found to be a prior offender since the plea court of that alleged prior offense "deferred accepting the plea agreement" until May 26, 2000, thus there was no final conviction until May 26th, 2000, and therefore the offense would not be a "prior" offense (Tr. 14). The trial court overruled Pond's objection (Tr. 14).

The State introduced into evidence a certified copy of the sentence and judgment of the alleged prior, which showed that Pond had been formally sentenced on May 26, 2000 (Tr. 16; SE No. 1). Pond again objected to being found to be a

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[2] The record on appeal consists of three volumes of transcript ("Tr."), a legal file ("L.F"), and State's Exhibits ("SE No."). Because of the age of the prosecutrix, appellant will only use her initials.

prior offender "on the basis that this [was] only a plea of guilty at the time up until May 26th of 2000 when the sentence and judgment was entered this matter was more-or less interlocutory in nature and the Court could have set aside the plea and it would have been for not (sic)" (Tr. 16-17).

The state also introduced into evidence a certified copy of the docket sheet of the alleged prior offense (Tr. 17; SE No. 2). On the docket sheet was an entry dated August 20, 1999, including "the standard stamp that the courts use," that read, in part, "The Court therefore accepts the plea of guilty to the charge of unlawful use of a weapon" (Tr. 17-18).[3] Pond again reiterated that the guilty plea was "interlocutory in nature" until sentencing, and since the alleged charged crime occurred prior to that sentencing, Pond was not a prior offender (Tr. 18-19). The trial court overruled Pond's objection and found him to be a prior offender (Tr. 19). A mistrial was declared, but at the trial subject to this appeal the trial court subsequently reaffirmed its prior offender ruling, thereby removing punishment from the jury (Tr. 21-22).

II. The evidence

[3] The docket entry also shows that the court deferred acceptance or rejection of the plea agreement (SE No. 2).

On May 25, 2000, Kathy Rigney, her husband, her two daughters, and her brother-in-law and his wife were living in a mobile home in Diamond, Missouri (Tr. 229).[4] Pond was Rigney's brother and A.S. was her niece (Tr. 228-229).

Because Pond had a court appointment scheduled on May 26th, he, his parents, and his sister Karen Kessinger and three of her children traveled from Texas to the Rigney residence the evening of May 25th (Tr. 229, 234, 237, 246-247, 257). They arrived between 8:00 and 9:00 p.m. (Tr. 230, 238-239). Their arrival was unusually early since they usually arrived in Missouri from Texas around 4:00 to 6:00 a.m. (Tr. 232, 238).

A.S. and her cousin Namieka went to sleep on the living room floor (Tr. 247-248). Ms. Kessinger and Pond slept on couches in that room (Tr. 248, 254). Sometime after they were asleep, Namieka woke up and noticed Pond sleeping on the floor next to A.S. (Tr. 255-256). Namieka did not hear any noises that night nor did she hear A.S. get up after they were asleep (Tr. 255-256).

The next morning, Namieka noticed that A.S. was shaking and looked "scared" (Tr. 249). A.S. told her that Pond "was touching her at a bad spot and he tried to stick her hand down his pants" (Tr. 250). By "bad spot" she meant "the bottom area of her" on the "front," or her "private parts" (Tr. 250).

In December 2001, Officer Brady Stewart was looking through the backpack of his daughter, A.S., when he saw a note (Tr. 188). The note indicated that she had

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[4] Diamond is in Jasper County (Tr. 229).

been "hurt" by a "relative" (Tr. 188). When Officer Stewart and his wife questioned their daughter, she said that the relative was Pond, he "had touched her private area, vagina area" and he hurt her (Tr. 188). A.S. acted scared (Tr. 189). They were able to determine the date of the alleged offense as being May 26th, because that was a date that Pond had to appear in court (Tr. 192-193). Officer Stewart contacted Detective Darren Gallup of the Joplin Police Department (Tr. 189, 259).[5]

Over Pond's hearsay objection, Detective Gallup responded "No" when asked by the state whether he was aware of "any information from any source of any evidence that would indicate that there's any fabrication in this case" (Tr. 268).

A.S. testified at trial. On May 25, 2000, she was spending the night at the Rigney trailer in Jasper County (Tr. 200-201).[6] Eventually, A.S. and Namieka went to sleep on a pallet on the living room floor (Tr. 204, 218).

Sometime during that evening or the early morning hours, Pond, his parents, and Ms. Kessinger and her children arrived from Texas (Tr. 201, 203, 204-205, 218, 219). Pond and Ms. Kessinger slept on two couches that were in the living room (Tr. 204, 219).

Sometime that night, or during the early morning hours of May 26th, A.S. woke up and found Pond beside her and "he was pressing in [her] private area

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[5] Gallup did not interview either Namieka or A.S. (Tr. 266).

[6] She was born on October 13, 1989, so she was ten years old at that time (Tr. 199, 251).

between [her] legs with his fingers" (Tr. 206-207). His hand was under her clothes (Tr. 207). His fingers were "in [her] body and it hurt" (Tr. 207). His fingers were there for what seemed to be a long time (Tr. 208, 210, 213-214). After he stopped, he grabbed her hand and "tried to put it in his boxers" (Tr. 209). She pulled her hand out and went to the bathroom to get away from him (Tr. 209, 225). She got back onto the pallet, but positioned herself so that Namieka was between her and appellant (Tr. 210, 226-227). The next morning she told Namieka what had happened (Tr. 211-212).[7]

A.S. did not tell her parents because when she told her "Aunt Kelly" on July 4, 2000, her aunt just said "okay" and did not do anything about it (Tr. 211).

In December of 2001, she was writing a letter to one of her friends about the incident, but her father found the letter (Tr. 214, 223-224). After the letter was discovered, A.S. told her mother that appellant touched her, but she did not tell either her mother or her father that appellant had penetrated her (Tr. 224). At an earlier hearing A.S. testified that appellant "pushed" on her private parts (Tr. 224).

III. Post-trial matters

On July 9-10, 2002, a jury trial was held before the Hon. William C. Crawford in the Circuit Court of Jasper County (L.F. 4-5). The trial court refused

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[7] Kathy Rigney testified that when she found out about the allegations, she questioned her daughter Namieka about it, and Namieka confirmed that A.S. had told her "something" (Tr. 233, 241).

Pond's lesser included offense instruction for child molestation in the first degree (Tr. 425-426; L.F. 32). The trial court ruled that there was no basis to acquit Pond of first degree sodomy and convict him of first degree child molestation, Pond's defense was a complete denial of the commission of any offense, and the instruction for child molestation had an element that was not present in first degree sodomy ("arousing of sexual desire") (Tr. 425-426).

After the foregoing evidence was presented, the jury found Pond guilty of the charged offense (Tr. 470; L.F. 34).[8] The trial court gave Pond the full time to file his motion for new trial, which was filed on August 5, 2002 (Tr. 471; L.F. 35-37).

On August 26, 2002, Judge Crawford overruled Pond's motion for new trial (Tr. 480) and sentenced him as a prior offender to fifteen years imprisonment (Tr. 493; L.F. 38-39).

On September 4, 2002, Pond timely filed a notice of appeal, in *forma pauperis* (L.F. 40-45). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

[8]Because Pond was found to be a prior offender, the jury did not recommend punishment.

POINTS RELIED ON

I.

The trial court plainly erred in finding Pond to be a prior offender, thereby removing sentencing from the jury, because the State did not prove that the alleged prior guilty plea qualified under Section 558.016, violating Pond's right to due process as guaranteed by the 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and to his statutory right to jury sentencing under Sections 557.036 and 558.016, resulting in a manifest injustice, in that Pond's prior felony guilty plea was not unconditionally accepted at the time of the commission of the charged offense since the plea court had deferred acceptance or rejection of the plea agreement until sentencing, which was after the date of the charged crime, and thus the plea court could have refused the guilty plea under Rule 24.02. A new trial on all issues is required, consistent with this Court's prior cases; an amendment to section 557.036, which occurred on the day that the Southern District reversed Pond's case, does not change that result because under section 1.160 that amendment would only apply to Pond's new trial, not the present appeal, and there is nothing about that amendment that would change the remedy on this appeal.

Peiffer v. State, 88 S.W.3d 439 (Mo.banc 2002);

State v. Golatt, 81 S.W.3d 640 (Mo.App. W.D., 2002);

Benford v. State, 54 S.W.3d 728 (Mo.App. S.D., 2001);

State v. Whardo, 859 S.W.2d 138 (Mo.banc 1993);

United States Constitution, Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 1.160, 557.036, 558.016;

Section 557.036.4, RSMo (effective June 27, 2003); and

Missouri Supreme Court Rules 24.02, 29.07(d), and 30.20.

II.

The trial court erred in refusing Pond's tendered instruction A on the offense of child molestation in the first degree as a lesser-included offense of statutory sodomy in the first degree because the evidence gave the jury a basis to acquit Pond of sodomy yet find him guilty of child molestation and therefore the trial court's ruling deprived Pond of his rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that child molestation in the first degree is a lesser-included offense of statutory sodomy in the first degree, and, the jury could have believed that Pond touched A.S.'s vagina with his hand (child molestation) but did not penetrate it with his finger (sodomy) based upon evidence that A.S. told her mother and father that Pond touched her but she did not tell them that he penetrated her, she told a cousin that Pond had touched her at a bad spot, and, at an earlier hearing, A.S. testified that Pond pushed on her private area but did not recall that she did not claim that she was penetrated while testifying at the preliminary hearing.

State v. Robinson, 26 S.W.3d 414 (Mo.App. E.D., 2000);

State v. Barnard, 972 S.W.2d 462 (Mo.App. W.D., 1997);

State v. Edwards, 980 S.W.2d 75 (Mo.App. E.D., 1998);

State v. Yacub, 976 S.W.2d 452 (Mo.banc 1998);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Sections 566.010(1), 566.010(3), 566.067, 566.068, RSMo 1994; and

Sections 566.010(1), 566.010(3), 566.062, RSMo 2000;

Sections 556.046, RSMo Supp. 2001; and

MAI-CR3d 320.17.

III.

The trial court plainly erred in overruling Pond's objection and in allowing Detective Gallup to testify that he was not aware of any information from any source of any evidence that would indicate that there was any fabrication in this case, because the ruling denied Pond his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that: Gallup's testimony was an impermissible opinion as to the credibility of his sources of information, including the victim; invaded the province of the jury; improperly vouched for the victim's credibility; and created a danger that the jury would rely on his credibility assessment of the investigation of the case instead of exercising its own responsibility to determine whether there was any fabrication by the victim.

State v. Churchill, 98 S.W.3d 536 (Mo.banc 2003);

State v. Williams, 858 S.W.2d 796 (Mo.App. E.D., 1993);

State v. Taylor, 663 S.W.2d 235 (Mo.banc 1984);

State v. Silvey, 894 S.W.2d 662 (Mo.banc 1995);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Rule 30.20.

ARGUMENT

I.

The trial court plainly erred in finding Pond to be a prior offender, thereby removing sentencing from the jury, because the State did not prove that the alleged prior guilty plea qualified under Section 558.016, violating Pond's right to due process as guaranteed by the 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, and to his statutory right to jury sentencing under Sections 557.036 and 558.016, resulting in a manifest injustice, in that Pond's prior felony guilty plea was not unconditionally accepted at the time of the commission of the charged offense since the plea court had deferred acceptance or rejection of the plea agreement until sentencing, which was after the date of the charged crime, and thus the plea court could have refused the guilty plea under Rule 24.02. A new trial on all issues is required, consistent with this Court's prior cases; an amendment to section 557.036, which occurred on the day that the Southern District reversed Pond's case, does not change that result because under section 1.160 that amendment would only apply to Pond's new trial, not the present appeal, and there is nothing about that amendment that would change the remedy on this appeal.

Introduction

There are two issues that must be answered to resolve Pond's first point.

1. The first issue is whether Pond is a prior offender pursuant to section 558.016 when the offense for which he is charged occurred after the time of his prior guilty plea, but before the plea court's acceptance of the plea agreement.

In the Southern District Court of Appeals, Pond argued that he was not a prior offender because his prior felony guilty plea was not final at the time of the commission of the charged offense because the plea court could have refused his guilty plea under Rule 24.02 before sentencing. The Southern District agreed, finding that because the plea court deferred acceptance or rejection of the plea agreement until sentencing, which was after the date of the charged crime, Pond's guilty plea to the prior felony was not unconditionally accepted before the commission of the offense for which Pond was charged as a prior offender.[9] As such, Pond's prior felony guilty plea was insufficient to invoke section 558.016; therefore, the State failed to prove Pond was a prior offender.

2. The State's only challenge in its transfer application is the remedy ordered by the Southern District, which was a new trial on all issues. The State's position is that the legislature's amendment of section 557.036, which now provides for a bifurcated trial wherein the parties can adduce additional evidence supporting or

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[9] In both its motion for rehearing or transfer in the Southern District and its transfer application to this Court, it appears that the State is not challenging the Southern District's finding that Pond was not a prior offender.

mitigating punishment after a finding of guilty, changes the proper remedy to a remand for retrial only on the issue of sentencing.

Thus, the second issue is whether section 557.036 as amended, alters the remedy for this error from a retrial on all issues to a remand for a sentencing trial only.

Pond contends that this legislative change in the type and manner of punishment evidence that can be presented to a jury at trial does not apply to this appeal because the change in the trial procedure could not affect a case pending on appeal in which a full retrial had already been ordered, rather it would only affect how the full retrial is held.

Facts

Appellant was charged by amended information as a prior offender, **Section 558.016** (L.F. 9-10). He had entered a guilty plea to felony unlawful use of a weapon on August 20, 1999 (L.F. 9), but the plea court deferred acceptance or rejection of the plea agreement, and sentencing on that offense was delayed until May 26, 2000 (Tr. 14; SE No. 2).

It was alleged that the charged offense occurred the night before that sentencing (Tr. 11, 169, 174, 434). As a result, Pond objected to the prior offender allegation since the plea court "deferred accepting the plea agreement" in the alleged prior offense until May 26, 2000, so there was no final conviction until May 26, 2000, and thus the offense would not be a "prior" offense (Tr. 14). The trial court overruled Pond's objection (Tr. 14).

The State introduced into evidence a certified copy of the sentence and judgment of the alleged prior, which showed that Pond had been formally sentenced on May 26, 2000 (Tr. 16; SE No. 1). Pond again objected to being found to be a prior offender "on the basis that this [was] only a plea of guilty at the time up until May 26 of 2000 when the sentence and judgment was entered this matter was more-or less interlocutory in nature and the Court could have set aside the plea and it would have been for not (sic)" (Tr. 16-17).

The State also introduced into evidence a certified copy of the docket sheet of the alleged prior offense (Tr. 17; SE No. 2). On the docket sheet was an entry dated August 20, 1999, including "the standard stamp that the courts use," which read, in part, "The Court therefore accepts the plea of guilty to the charge of unlawful use of a weapon" (Tr. 17-18). The docket entry, however, also shows that the court deferred acceptance or rejection of the plea agreement (SE No. 2). Pond again reiterated that the guilty plea was "interlocutory in nature" until sentencing, and since the alleged charged crime occurred prior to that sentencing Pond was not a prior offender (Tr. 18-19). The trial court overruled Pond's objection and found him to be a prior offender (Tr. 19).

Standard of Review

Although Pond objected to the trial court finding him to be a prior offender, the issue was not included in his motion for new trial, and so Pond must request that this Court grant plain error review. **Rule 30.20**. Missouri case law has found where

a defendant has been improperly sentenced as a prior offender, a manifest injustice has occurred and it is appropriate for plain error. ***State v. Golatt***, 81 S.W.3d 640 (Mo.App. W.D., 2002).[10]

1. Pond is not a prior offender because the charged offense occurred after the time of his guilty plea, but before the plea court's acceptance of the plea agreement

Pond has a statutory right to jury sentencing.[11] **Section 557.036.2** provides that "The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilty to assess and declare the punishment as a part of their verdict, unless . . . [t]he state pleads and proves the defendant is a prior offender . . .". A "prior offender" is "one who has pleaded guilty to or has been found guilty of one felony." **Section 558.016.2**. But the "pleas . . . of guilty shall be prior to the date of commission of the present offense." **Section 558.016.6**. Prior versions of **558.016** required convictions, but that section was amended to include suspended imposition of sentences. ***State v. Lynch***, 679 S.W.2d 858, 861 (Mo.,1984),

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[10] This Court recently engaged in plain error review concerning an attack on a prior offender finding. ***State v. Grubb***, No. SC85195, slip op. (Mo.banc October 28, 2003).

[11] As will be discussed below, sections 557.036 and 558.016 have been amended, effective June 27, 2003.

overruled on other grounds, ***Yale v. City of Independence***, 846 S.W.2d 193 (Mo.,1993)).

The State has the burden of proving beyond a reasonable doubt that Pond has the requisite qualifying prior conviction. ***State v. Finch***, 746 S.W.2d 607, 611 (Mo.App. W.D., 1988). The failure to do so results in a deprivation of his right to due process.[12] ***Scharnhorst v. State***, 775 S.W.2d 241, 246, n 4, (Mo.App. W.D., 1989).

It is undisputed that the charged offense was committed between the time Pond tendered his guilty plea to the felony of unlawful use of a weapon and the date he was sentenced for that offense (SE Nos. 1 & 2; Tr. 11, 169, 174, 434). Further, at the time of the tendered plea, the plea court "defer[red] the acceptance or rejection of the plea agreement" until sentencing (SE No. 2). Ultimately, the plea court did not accept that plea agreement until *after* the commission of the present offense (SE No. 2).

So, the first issue to be resolved in this point is whether Pond can be found to be a prior offender when the charged offense occurred after the time of Pond's guilty plea, but before the court's acceptance of the plea agreement. Pond is not a prior offender because of this sequence of events, and therefore he was deprived of his right to jury sentencing. **Sections 557.036.2** and **558.016**. His guilty plea was

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[12]**Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution**.

not final at the time of the commission of the charged offense because the plea court could have refused his guilty plea under **Rule 24.02**[13] before sentencing. Therefore it did not qualify under as a prior felony under **section 558.016**.

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[13] **Rule 24.02(d)** provides, in pertinent part:

2. *Disclosure of Plea Agreement -- Court's Action Thereon*. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

3. *Acceptance of a Plea Agreement*. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

4. *Rejection of a Plea Agreement*. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

There are cases where the plea or finding of guilt *and* the sentencing occurred after the "present offense." *See*, ***Golatt,*** *supra*; ***State v. McFall,*** 866 S.W.2d 915 (Mo.App. S.D., 1993). But Pond can find no cases wherein the "present offense" occurred between the date of the prior plea or finding of guilt and the sentencing or final acceptance of that prior plea.

It is true that if the defendant receives a suspended imposition of sentence, the defendant can still be found to be a prior offender. *See* ***State v. Talkington***, 25 S.W.3d 657, 658 (Mo.App. S.D., 2000). Here, however, the plea court not only deferred sentencing, but also deferred acceptance or rejection of the plea agreement (SE No. 2). Pond contends, and the Southern District found, that an unconditional acceptance of a guilty plea is required to invoke extended term provisions under section 558.016. ***State v. Pond***, No. SD25137, slip op. at 7-9 (June 27, 2003). This Court's recent opinion in ***Peiffer v. State***, 88 S.W.3d 439, 445 (Mo.banc 2002) supports Pond's, and the Southern District's, positions.

In ***Peiffer***, this Court in discussing a double jeopardy claim adopted a rule "that double jeopardy attaches to a guilty plea upon its *unconditional acceptance*." ***Id***. at 444 (emphasis added). This Court noted that once a defendant's guilty plea "is *unconditionally accepted*, defendant is bound by the plea and is unable to withdraw

it except in the exceptional circumstances set out in Rule 29.07(d)." ***Id***. at 445 (emphasis added).[14] In doing so, this Court held:

> In any event, even though entry of a plea of guilty is not a conviction, consequences do attach to it. For instance, the mere **unconditional acceptance of a guilty plea**, in the absence of a conviction, is sufficient to invoke extended term provisions. Section 558.016. For all of these reasons, this Court holds that jeopardy attaches at the time of entry of an unconditional plea.

Id. (emphasis added).

It is clear from this language that an "unconditional acceptance of a guilty plea" is required to invoke the provisions of **Section 558.016**. ***Id***. But at the time of the present offense there wasn't an unconditional acceptance of Pond's prior guilty plea since the trial court had deferred the acceptance or rejection of the plea agreement (SE No. 2). Under **Rule 24.02** the plea court could have refused to accept the guilty plea.

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[14] **Rule 29.07(d)** provides:

A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Pond pled guilty to the felony of unlawful use of a weapon on August 20, 1999 (SE No. 2). The plea court accepted his guilty plea but deferred acceptance or rejection of the plea agreement (SE No. 2). **Rule 24.02(d)(4)** afforded Pond the opportunity to withdraw his plea if the plea court determined it would not sentence him according to the original plea agreement. ***Benford v. State*** , 54 S.W.3d 728, 733 (Mo.App. S.D., 2001). Because Pond could have withdrawn his guilty plea under Rule 24.02(d)(4) upon the trial court's rejection of the plea agreement, unconditional acceptance of the guilty plea did not occur until the plea court accepted both the guilty plea and the plea agreement. This unconditional acceptance of the guilty plea occurred *after* the commission of the charged offense. As such, Pond's guilty plea to the felony of unlawful use of a weapon was insufficient to invoke **section 558.016**; therefore, the State failed to prove Pond was a prior offender.

The remedy: Pond is entitled to a new trial on all issues

In both its motion for rehearing or transfer in the Southern District and its transfer application to this Court, the State does not challenge the Southern District's finding that Pond was a prior offender. The State's only challenge in these motions is the remedy ordered by the Southern District, which was a new trial on all issues. The State's position is that the legislature's amendment of **section 557.036**, which now provides for a bifurcated trial wherein the parties can adduce additional

evidence supporting or mitigating punishment after a finding of guilty, changes the proper remedy to a remand for retrial only on the issue of sentencing.

Thus, the second issue is whether the appellate court's remand for a new trial on all issues, because it found Pond is not a prior offender, which is consistent with this Court's prior holdings, is affected by the legislative change on the same day in the procedure for that new trial -- allowing the parties to adduce additional evidence regarding punishment after a finding of guilty -- so as alter the remedy for this error to a remand only for a sentencing trial. Pond contends that this legislative change, which allows for bifurcated criminal trials in non-capital cases, **section 557.036.2 (effective June 27, 2003**), does change the remedy on this appeal because the change in the trial procedure could not affect a pending case in which a full retrial had already been ordered, rather it would only affect how the full retrial is held.

In its transfer application, Respondent asserts that because Senate Bill 5 was signed by the Governor on June 27th, the same day the Southern District issued its opinion, and was effective immediately pursuant to an emergency clause, the remedy should be retrial only on the issue of sentencing.

Senate Bill 5 contains an amendment to **section 557.036** that creates a bifurcated jury trial system where, when both guilt and punishment are being submitted to the jury, the trial has two stages, a guilt stage and a punishment stage. **Section 557.036.2 (effective June 27, 2003)**. There is no second stage of the trial if the defendant waives punishment or if the state pleads and proves the defendant is a prior offender, persistent offender, dangerous offender, persistent misdemeanor

offender, persistent sexual offender, or a predatory sexual offender. **Section 557.036.4, RSMo (effective June 27, 2003)**. If the jury at the first stage finds the defendant guilty, a second stage occurs where punishment is assessed and declared. **Section 557.036.2, 3, (effective June 27, 2003)**. At that stage, evidence supporting or mitigating punishment may be presented, including such things as victim impact evidence. **Section 557.036.3 (effective June 27, 2003)**.

Section 1.160 prohibits the application of this amendment to Pond's case *on appeal*. That section provides, "*No* offense committed and no fine, penalty or forfeiture incurred, or *prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment*, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except: (1) That all such proceedings shall be conducted according to existing procedural laws; and (2) That if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law." (emphasis added).

Although the first exception allows proceedings to "be conducted according to existing procedural laws," the amendment to **section 557.036** only changes the trial proceedings and Pond's trial had already occurred prior to the amendment, therefore that exception does not apply at this juncture and the amendment to **section 557.036** does not affect Pond's case *on appeal*.

Pond admits, however, that the amendment to **section 557.036** will apply to his new trial, which will be on all issues.[15] At Pond's new trial the jury will get to hear additional evidence supporting or mitigating the punishment prior to assessing punishment if it finds Pond guilty. Respondent does not explain how the bifurcated nature of this new procedure changes this Court's prior cases that have uniformly held that an entire new trial is the proper remedy when the defendant is improperly found to be a prior or habitual offender.[16]

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[15] Under this Court's cases, the application of the amended section 557.036 to the new trial would be not an *ex post facto* law. ***State v. Griffin***, 339 S.W.2d 803 (Mo. 1960); ***State v. Morton***, 338 S.W.2d 858 (Mo. 1960).

[16] *Also see*, ***State v. Harris***, 547 S.W.2d 473 (Mo. 1977); ***State v. Morris***, 460 S.W.2d 624 (Mo. 1970); ***State v. Parker***, 458 S.W.2d 241 (Mo. 1970); ***State v. Tettamble***, 450 S.W.2d 191 (Mo. 1970); ***State v. Vermillion***, 446 S.W.2d 788 (Mo. 1969); ***State v. Williams***, 442 S.W.2d 61 (Mo. 1968); ***State v. Holmes***, 434 S.W.2d 555 (Mo. 1968); ***State v. Hawkins***, 418 S.W.2d 921 (Mo. 1967); ***State v. Garrett***, 416 S.W.2d 116 (Mo. 1967); ***State v. Deutschmann***, 392 S.W.2d 279 (Mo. 1965); ***State v. Kent***, 375 S.W.2d 40 (Mo. 1964); ***State v. Hill***, 371 S.W.2d 278 (Mo. 1963); ***State v. Young***, 366 S.W.2d 386 (Mo. 1963); ***State v. Kiddoo***, 354 S.W.2d 883 (Mo. 1962); ***State v. Krebs***, 80 S.W.2d 196 (Mo. 1935).

Under this Court's prior cases, e.g., ***State v. Hill***, 371 S.W.2d 278 (Mo. 1963), if the State did not prove the defendant was a prior offender, then on appeal the defendant would get a new trial on all issues. There is nothing about Senate Bill 5 that would compel the remedy sought by Respondent.

At a jury trial held *prior* to Senate Bill 5, if a defendant did not waive jury punishment and if the defendant was not a prior offender (or one of the other denominated offenders), the same jury would decide guilt or innocence, and then punishment if the defendant were determined to be guilty. And if the defendant was improperly found to be a prior offender at trial, the appellate courts would remand for a new trial on *all issues*. *See* cases cited in Footnote 16.

The same situation occurs after the enactment of Senate Bill 5. The changes in 557.036 really do nothing more than change what and when additional punishment evidence is presented to the jury. In essence, where a jury is to decide both guilt and punishment, this amendment allows both parties to present additional evidence regarding punishment that they could not have presented to a jury prior to the amendment. This is accomplished by having the jury first render its verdict of guilty before allowing the parties to present the additional evidence. Just like the situation prior to the enactment of Senate Bill No. 5, the same jury determines both guilt and punishment; however, after the Senate Bill No. 5's enactment, the jury gets to hear additional evidence before rendering its punishment. Therefore, the same remedy, a new trial on all issues, should apply. *In accord*, ***State v. Whardo,*** 859 S.W.2d 138 (Mo.banc 1993). (holding that because Whardo was not charged as a prior offender,

under section 557.036.2, it was his prerogative to have a jury assess punishment, and therefore a complete new trial was warranted).

Respondent cites ***State v. Kelley***, 953 S.W.2d 73, 78-79 (Mo.App. S.D. 1997) and ***State v. Wings***, 867 S.W.2d 607 (Mo.App. E.D., 1993) in support of its transfer application. But those cases do not control.

Kelley dealt with a situation concerning the retroactivity of a joinder statute. In that case, an amendment to the murder joinder statute was allowed to govern the trial. But unlike Senate Bill 5, that amendment occurred prior to that appellant's trial, not while the case was pending on appeal.

Wings dealt with a statute, section 494.480, that was amended to state that jurors' qualifications are not grounds for new trial *or reversal* unless the juror participated in the verdict. But that amendment applied not only to trial proceedings but also to appellate proceedings. Therefore, the amendment was properly allowed to affect the pending appeal.

Since Pond did not have one qualifying prior conviction, his judgment and conviction must be reversed, and the cause remanded for a new trial on all issues.

II.

The trial court erred in refusing Pond's tendered instruction A on the offense of child molestation in the first degree as a lesser-included offense of statutory sodomy in the first degree because the evidence gave the jury a basis to acquit Pond of sodomy yet find him guilty of child molestation and therefore the trial court's ruling deprived Pond of his rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that child molestation in the first degree is a lesser-included offense of statutory sodomy in the first degree, and, the jury could have believed that Pond touched A.S.'s vagina with his hand (child molestation) but did not penetrate it with his finger (sodomy) based upon evidence that A.S. told her mother and father that appellant touched her but she did not tell them that he penetrated her, she told a cousin that Pond had touched her at a bad spot, and, at an earlier hearing, A.S. testified that Pond pushed on her private area but did not recall that she did not claim that she was penetrated while testifying at the preliminary hearing.

Introduction

According to the verdict director it submitted, the State's theory of the offense of statutory sodomy in the first degree was that Pond penetrated A.S.'s vagina with his finger (Instruction No. 5; L.F. 27). A.S., who was ten-years-old at the

time of the alleged offense (Tr. 199, 251) testified that Pond did this (Tr. 206-208, 210, 213-214).

But that is not the end of the inquiry in deciding whether a lesser-included instruction was required. On cross-examination, A.S. admitted that while she told her mother that Pond "touched" her, she did not tell either her mother or father that appellant "penetrated her" (Tr. 224). A.S. also admitted that "at an earlier hearing back on February of [2002],"[17] she had testified that Pond "pushed on her private area" (Tr. 224). But when asked: "But you didn't say that he penetrated your private area, did you?" A.S. said that she did not remember exactly what she said (Tr. 224). Further, A.S.'s cousin testified that the morning after the alleged offense, A.S. told her that Pond "was touching her at a bad spot and he tried to stick her hand down his pants" (Tr. 250). By bad spot, A.S. was referring to her genital area (Tr. 250). Also, Officer Stewart testified that when he and his wife questioned their daughter, she said that Pond "had touched her private area, vagina area" (Tr. 188) (emphasis added). This evidence could have supported a jury finding that no penetration took place and thus created an issue of whether Pond was entitled to instructions for the offense of child molestation in the first degree which he submitted as a lesser included offense to statutory sodomy in the first degree. A new trial is required.

Facts

At trial, Pond offered Instruction A, which read as follows:

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[17] The preliminary hearing was held on February 6, 2002 (L.F. 2).

If you do not find the defendant guilty of statutory sodomy in the first degree as submitted in Instruction No. 5, you must consider whether he is guilty of child molestation in the first degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May, 2000, in the County of Jasper, State of Missouri, the defendant touched the genitals of [A.S.], and

Second, that he did so for the purpose of gratifying his own sexual desire, and

Third, that [A.S.] was then less than twelve years old,

then you will find the defendant guilty of child molestation in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR3d 320.17 as modified by 304.08 and 304.02.

Submitted by Defendant

(L.F. 32).

The trial court refused Pond's lesser-included offense instruction for child molestation in the first degree (Tr. 425-426; L.F. 32). The trial court ruled that there was no basis to acquit Pond of first degree sodomy and convict him of first degree child molestation, Pond's defense was a complete denial of the commission

of any offense, and the instruction for child molestation had an element that was not present in first degree sodomy ("arousing of sexual desire") (Tr. 425-426).

In Pond's timely motion for new trial he alleged that the trial court erred in refusing to submit his proposed lesser-included offense Instruction A, which submitted child molestation in the first degree, violating his rights to due process and a fair trial as guaranteed by the **5th, 6th, and 14th Amendments to the United States Constitution** and **Article I, Sections 10 and 18(a) of the Missouri Constitution**. Therefore, this point is properly preserved for appeal.

Standard of Review

A defendant is entitled to an instruction on any theory that the evidence and *the reasonable inferences therefrom* tend to establish. ***State v. Westfall***, 75 S.W.3d 278, 280 (Mo.banc 2002). If the evidence tends to support differing conclusions, the defendant is entitled to an instruction. ***Id***. Jury instruction as to all potential defenses is so essential to ensure a fair trial that if a reasonable juror could draw inferences from the evidence presented the defendant is not required to put on affirmative evidence to support a given instruction. ***Id***. at 281 (*citing*, ***State v. Santillan***, 948 S.W.2d 574, 576 (Mo.banc 1997)). The failure of the trial court to instruct on all lesser-included offenses supported by the evidence is error. ***State v. Derenzy***, 89 S.W.3d 472 (Mo.banc 2002). A defendant has a due process right to lesser-included offense instructions if they are warranted by the evidence. ***Mercer v. State***, 666 S.W.2d 942, 945 (Mo.App. S.D., 1984).

Discussion

A trial court is required to instruct on a lesser-included offense if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction on the lesser offense, and if such instruction is requested by one of the parties. ***State v. Santillan***, 948 S.W.2d 574, 576 (Mo.banc 1997); *see also* **Section 556.046, RSMo Supp. 2001**. "Doubt as to whether to instruct on the included offense is to be resolved in favor of instructing on the included offense." ***State v. Yacub***, 976 S.W.2d 452, 453 (Mo.banc 1998); ***State v. Barnard***, 972 S.W.2d 462, 464 (Mo.App. W.D., 1997). Jurors may accept part of a witness' testimony while disbelieving other portions. ***State v. Robinson***, 26 S.W.3d 414, 417 (Mo.App. E.D., 2000). Jurors may also draw certain inferences from a witness's testimony, but reject others. ***State v. Redmond***, 937 S.W.2d 205, 209 (Mo.banc 1996). Further, the evidence is viewed in the light most favorable to the defendant, i.e., in the light most favorable to the giving of the instruction. ***State v. Edwards***, 980 S.W.2d 75, 76 (Mo.App. E.D., 1998); ***State v. Craig***, 33 S.W.3d 597, 601 (Mo.App. E.D., 2001).

In deciding whether the trial court erred in refusing tendered Instruction A, two questions must be addressed. First, is child molestation in the first degree a lesser-included offense of statutory sodomy in the first degree when the victim is less than twelve-years-old? Second, was there a basis in the evidence for an acquittal of statutory sodomy in the first degree but a finding of guilt on child molestation in

the first degree? The answer to both questions is "yes." The answers to both of these questions are established by ***State v. Barnard*** and ***State v. Robinson***.

(1) First degree child molestation is a lesser-included offense

Statutory sodomy in the first degree requires that a defendant engage in deviate sexual intercourse with another person; this includes digital penetration. ***Robinson***, 26 S.W.3d at 417; **Sections 566.010(1), RSMo 1994** and **566.062**.[18] Child molestation in the first degree requires that a defendant subject another person to sexual contact (e.g., touching of the vaginal area without penetration).[19] ***Robinson***, 26 S.W.3d at 417; **Sections 566.010(3) and 566.067, RSMo 1994**.

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[18] "Deviate sexual intercourse," was defined as "any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person." **Section 566.010(1), RSMo 1994**. An amendment, effective August 28, 2000, now includes "hand" before "mouth, tongue or anus." **Section 566.010(1), RSMo 2000**.

[19] "Sexual contact," is defined as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person." **Section 566.010(3), RSMo 1994**. That definition was also amended in 2000, but

The jury in this case was instructed that in order to find Pond guilty it had to find that Pond had "inserted his finger into [A.S.'s] vagina", which is conduct constituting deviate sexual intercourse, that he did so for "the purpose of arousing or gratifying the sexual desire of any person" and that at the time of the offense, A.S. was less than twelve years old (L.F. 27).

Similarly, under Pond's refused instruction, the jury would have been required to find that Pond touched the genitals of A.S., that he did so for "the purpose of arousing or gratifying the sexual desire of any person,"[20] and that A.S. was less than twelve years old (L.F. 32). The second two elements are identical to statutory sodomy.

Regarding the first element, that Pond "touched the genitals of [A.S.]" (L.F. 32), it would be impossible for Pond to have inserted his fingers into AS.'s vagina without touching her genitals. Thus, it was impossible under the facts of this case, for Pond to have committed statutory sodomy without committing the offense of child molestation in the first degree. Child molestation in the first degree is a

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the amendment was cosmetic and did not change the definition. An amendment in 2002 has further changed the definition.

[20] Thus, the trial court's finding that "Instruction No. provides an element that is not in the higher offense and (sic) to the arousing of sexual desire" (Tr. 425-426) is erroneous.

lesser-included offense of statutory sodomy. Other courts have come to this same conclusion.

In ***Barnard***, the Western District Court of Appeals addressed the issue of whether child molestation in the second degree is a lesser-included offense of statutory sodomy in the first degree in a case where the "deviate sexual intercourse" was digital penetration. After applying the statutory elements test, the ***Barnard*** court found that it was, 972 S.W.2d at 465. The only difference between child molestation in the second degree and child molestation in the first degree is the age of the child. Compare **Sections 566.067** and **566.068, RSMo 1994**.[21]

In ***Robinson***, the State conceded, and the Eastern District Court of Appeals found, that child molestation in the first degree is a lesser-included offense of statutory sodomy in the first degree when the charging document includes the same statutory age element for statutory sodomy as child molestation. 26 S.W.3d at 417. Here, the age of A.S. was ten, and therefore falls within both age elements for first degree statutory sodomy (less than fourteen years), **Section 566.062.1**, and first degree child molestation (less than twelve years), **Section 566.067.1, RSMo 1994**.

Respondent's brief in the Southern District Court of Appeals did not dispute that child molestation in the first degree is a lesser-included offense of statutory sodomy (Resp. Br. at 14-20). The Southern District noted this in its opinion: "The

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[21] Those sections have since been amended, but the alleged crime was in May of 2000, and the amendments were not effective until August 28, 2000.

parties do not dispute that child molestation in the first degree is a lesser included offense of statutory sodomy in the first degree" ***State v. Pond***, No. SD25137, slip op. at 10 (June 27, 2003).[22]

(2) There is a basis in the evidence for an acquittal of statutory sodomy in the first degree but a finding of guilt on child molestation in the first degree

The final issue is whether the evidence was such that the trial court's refusal to instruct on the lesser-included offense of child molestation in the first degree was error. It was. In order for there to be a basis for an acquittal of the greater offense, "there must be some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater, and conviction of the lesser offense. ***Barnard***, *supra* at 466, citations omitted.

As noted above, A.S. admitted that while she told her mother that Pond "touched" her, she did not tell either her mother or father that Pond "penetrated her" (Tr. 224). A.S. also admitted that at the preliminary hearing she had testified that appellant "pushed on her private area" (Tr. 224). But when asked: "But you didn't say that he penetrated your private area, did you?" A.S. said that she did not remember exactly what she said (Tr. 224). Consistent with that prior testimony, A.S.'s cousin testified that the morning after the alleged offense, A.S. told her that

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[22] The Southern District declined to decide this point, however, because it reversed for a new trial on appellant's first point. ***Pond***, No. SD25137, slip op. at 10.

Pond "was *touching* her at a bad spot and he tried to stick her hand down his pants" (Tr. 250) (emphasis added). Also, Officer Stewart testified that when he and his wife questioned their daughter, she said that Pond "had touched her private area, vagina area" (Tr. 188). Significantly, the state presented no physical evidence, such as the lack of a hymen or other evidence of trauma, which may have supported A.S.'s trial testimony about penetration.

Thus, given the evidence presented at trial, there was a basis for acquittal of statutory sodomy, since the jury could have found that there was no evidence of penetration by Pond. Yet, there was also a basis in the evidence for a finding that Pond had subjected A.S. to sexual contact, touching without penetration, thereby establishing his guilt of the lesser offense. In other words, the jury could have disbelieved the portions of A.S.'s trial testimony about penetration but could have believed her earlier statements that mentioned touching while omitting penetration.

Respondent's position in the Southern District was that Pond "was not entitled to an instruction on the lesser included offense of child molestation because there was not an evidentiary basis for an acquittal of the greater offense." (Resp. Br. at 15).

It is true that the jury could have found that there was penetration. E.g. (Tr. 210) (victim testified that Pond's "hand or his fingers" "was in my vagina"). But the jury also could have believed that her trial testimony grew in the telling. I.e., her trial testimony was exaggerated since it was different than her pre-trial statements, which would have only supported a child molestation conviction.

For instance, the victim's father gave the following testimony:

Q. Did she tell you what he had done to her?

A. Initially, she just said that he had **touched** her private area, vagina area, and then stated that he hurt her.

(Tr. 188) (Emphasis added).

In that same vein, the victim gave the following testimony during cross-examination:

Q. All right. And you told your mother that Casey touched you?

A. Yes, sir.

Q. You didn't tell your mother that he penetrated you, did you?

A. At the time, no.

Q. You didn't tell your father that either, did you?

A. No, sir.

Q. You testified at an earlier hearing back on February of this year?

A. Yes, sir.

Q. And I believe at that earlier hearing do you recall testifying that Casey pushed on your private area?

A. Yes, sir.

Q. But you didn't say that he penetrated your private area, did you?

A. It hurt, sir. I don't remember what exactly I said.

(Tr. 224) (Emphasis added).

Similarly, the victim's cousin testified:

Q. Did [victim] tell you something that happened?

A. Yes.

Q. What did she tell you?

A. She told me that her Uncle Casey was touching her at a bad spot and he tried to stick her hand down his pants.

(Tr. 250) (emphasis added).

Clearly evidence that Pond "touched" the victim would not be sufficient to support penetration, which is required for statutory sodomy in the first degree; but it would support a child molestation conviction. ***State v. Barnard***, 972 S.W.2d 462, 464 (Mo.App. W.D., 1997). *Also see*, ***People v. Bell*** 625 N.E.2d 188 (Ill.App. 1 Dist.,1993) (evidence that defendant "touched" five-year-old complainant's vagina did not establish penetration); ***People v. Kelly*** 540 N.E.2d 1125 (Ill.App. 3 Dist.,1989) (minor's testimony at trial that defendant had "touched" her with his finger in her "naughty place" was insufficient to prove penetration). And, since the jury could have found that the victim was only "touched" without penetration, there was evidence to support the giving of a lesser included offense instruction.

Respondent, however, asserted in its brief that none the foregoing passages of testimony "negates or contradicts testimony that Pond penetrated the victim's vagina." (Resp. Br. at 18). That is not the standard for determining whether to submit a lesser included offense instruction.

But equally important, it is clear from the witnesses' testimonies that they understood that there was a difference between touching and penetration and yet acknowledged that the victim at first said that only "touching" occurred. The victim never testified that at the time she spoke to her parents that she meant "penetrated" when she said "touched." On the contrary, she admitted that when she told her parents that Pond had "touched" her that she did not tell them that she had been penetrated. If she had meant "penetrated" when she used the term "touched" to her parents, then logically her answer to defense counsel's question, "You didn't tell your mother that he penetrated you, did you?" should have been "Yes, although I did not use that word." If that were the case, then she would not have given the answer that she did, "At the time, no." (Tr. 224).

Defense counsel asked her if she had told her mother that she had been penetrated. And, her answer to that question was "no." Therefore, *the reasonable inferences* from this evidence tended to establish while Pond "touched" the victim's private area, he did not "penetrate" her. Thus, there was an "evidentiary basis for an acquittal of the greater offense." ***Westfall***, 75 S.W.3d at 280-281. (Resp. Br. at 15). This is especially true in light of the State's failure to present any corroborating physical evidence of penetration.

Therefore, the trial court erred in refusing Instruction A and this court should reverse Pond's conviction for statutory sodomy in the first degree and remand for a new trial.

III.

The trial court plainly erred in overruling Pond's objection and in allowing Detective Gallup to testify that he was not aware of any information from any source of any evidence that would indicate that there was any fabrication in this case, because the ruling denied Pond his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that: Gallup's testimony was an impermissible opinion as to the credibility of his sources of information, including the victim; invaded the province of the jury; improperly vouched for the victim's credibility; and created a danger that the jury would rely on his credibility assessment of the investigation of the case instead of exercising its own responsibility to determine whether there was any fabrication by the victim.

Facts

During the state's redirect examination of Detective Gallup, the following occurred:

Q. Detective, did you review any of the investigative reports that were prepared by the Jasper County Division of Family Services?

A. Yes.

Q. Did you see anything in those reports in the way the investigation was –

[BY DEFNSE COUNSEL]: Your Honor, I'm going to object to the hearsay –

BY THE COURT: I haven't heard the question yet. Finish the question.

Q. [BY THE ASSISTANT PROSECUTOR]: Did you see anything in those reports that would indicate fabrication in this case?

[BY DEFNSE COUNSEL]: I object to the hearsay nature of the question and the inferential hearsay that –

BY THE COURT: Objection sustained.

Q. [BY THE ASSISTANT PROSECUTOR]: [Defense counsel], asked you about divorce and reasons for suggestiveness. Are you aware of any reasons that this child would have been subject to a suggestive response in making the statements that she did?

A. No.

Q. Were you aware of any information from any source of any evidence that would indicate that there's any fabrication in this case?

[BY DEFNSE COUNSEL]: Objection, Your Honor. Again, it's calling for hearsay.

[BY THE COURT]: Overruled. He can answer that.

A. (By the Witness) No.

(Tr. 267-268).

Standard of Review

Pond raised the issue in his motion for new trial (L.F. 36; Claim 4). However, because the only objection at trial was based on "hearsay," Pond must

request that this court review for plain error, **Rule 30.20**, because the error resulted in a manifest injustice.

Discussion

A trial court also has wide discretion in admitting testimony. ***State v. Churchill***, 98 S.W.3d 536, 538 (Mo.banc 2003). The testimony of lay witnesses, however, must generally be restricted to statements of fact rather than opinions or conclusions. ***State v. Kluck***, 968 S.W.2d 206, 207-208 (Mo.App. S.D., 1998). Thus, it is not proper for a lay witness to state a conclusion concerning the ultimate issue for the jury, or to give an opinion as to another person's state of mind. ***Id***. Witnesses should not be allowed to give their opinion as to the veracity of another witness's statement, because in so doing, they invade the province of the jury. ***Churchill***, 98 S.W.3d at 538-539. Testimony concerning a specific victim's credibility as to whether they have been abused must be rejected because it usurps the decision-making function of the jury and, therefore, is inadmissible. ***Id***. Indeed, this Court has held that even expert testimony is inadmissible if it relates to the credibility of witnesses because this constitutes an invasion of the province of the jury. ***State v. Lawhorn***, 762 S.W.2d 820, 823 (Mo.banc 1988); ***State v. Taylor***, 663 S.W.2d 235 (Mo.banc 1984).

In ***Churchill***, this Court disapproved the state's use of a doctor's testimony that changes in the victim's testimony meant that "a significant event had occurred in the girl's life," and that what the victim had described to him "was real" and "had

occurred to her." 98 S.W.3d at 538. This Court found reversible error, holding that although the doctor may have been sincere in her belief that the victim was telling the truth, it is the province of the jury to make that conclusion. ***Id***. at 98 S.W.3d at 539.

In ***Taylor***, this Court disapproved the state's use of a psychiatrist's opinion that the alleged victim suffered from rape trauma syndrome as a result of the rape incident she described; this went "beyond proper limits of opinion expression." 663 S.W.2d at 239-40. This Court noted that the jury was competent to assess the witnesses' testimony, and allowing a doctor to express his opinion of the alleged victim's veracity "designed to invest scientific cachet on the critical issue was erroneously admitted." ***Id***. at 241.

Similarly, in ***State v. Williams***, 858 S.W.2d 796, 800-801 (Mo.App. E.D., 1993), the Eastern District reversed the defendant's conviction where the witness did not even address the *victim's* individual credibility, but only opined that "very rarely do children lie about" sexual abuse. Indeed, the court found that this vouching reached the level of manifest injustice and reversed for plain error. ***Id***.

> Since the jury's verdict was the result of its impression of the witnesses' credibility, we hold that the doctor's opinion on the truthfulness of the victim manifestly prejudiced appellant by usurping the province of the jury. The danger was too great that the jury accepted the doctor's testimony as conclusive of appellant's guilt

> without making an independent determination of the victim's credibility. The doctor's statements amounted to an impressively qualified stamp of truthfulness on the victim's story, and a miscarriage of justice will result from a refusal to reverse for plain error."

Id., at 801. No less occurred in this case.

Further, in ***State v. Silvey***, 894 S.W.2d 662, 671 (Mo.banc 1995), this Court approved the analysis from ***Williams***. In doing so, this Court noted that the ***Williams*** court made clear that there are generally two types of expert testimony challenged in child sexual abuse cases:

> 1) general testimony describing behaviors and other characteristics commonly observed in sexually abused victims (often called general "profile" testimony); and 2) particularized testimony concerning the alleged victim's credibility. While the trial court has great discretion in admitting the former, the latter usurps the province of the trier of fact and is inadmissible.

Silvey, 894 S.W.2d at 671, *quoting* ***Williams***, 858 S.W.2d at 798-99. In accord, ***Churchill***, *supra*. Gallup's testimony was of the latter variety, and the court plainly erred in overruling Pond's objection.

Respondent's brief in the Southern District asserted that Pond opened the door to this testimony when he cross-examined Gallup concerning the thoroughness

of Gallup's investigation. (Resp. Br. at 28-29). Pond disagrees; he was merely attempting to discredit some of Gallup's testimony on direct examination.

For instance, Gallup testified that in his experience it is not unusual for a ten-year-old female who had been sexually molested to not tell her parents (Tr. 261). He also testified that there is no wrong or right way for such a child to behave (Tr. 261). If such a child did not immediately run to an adult that would not mean that it did not occur (Tr. 262). It is not uncommon for a child to wait a significant amount of time before they told their parents about such abuse (Tr. 262).

So, although defense counsel did cross-examine Gallup concerning children possibly making up stories (Tr. 264-267), because Gallup did not even interview the victim or her cousin (Tr. 266), it is clear that Pond was merely attempting to question the relevance of Gallup's generalized testimony to the instant case. So, although under the doctrine of curative admissibility the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects, if the state first injects the issue, the doctrine is inapplicable. ***State v. Revelle***, 957 S.W.2d 428, 433 (Mo.App. S.D., 1997).

Here, this evidence was very harmful to Pond's case because the jury's decision came down to appraising the relative credibility of Pond and A.S.. There was no medical or physical evidence to support A.S.'s claims. Therefore, Gallup's testimony that there was no evidence of fabrication resulted in a manifest injustice. This Court must reverse Pond's conviction and remand for a new trial.

CONCLUSION

For the reasons presented above, appellant requests that this Court reverse his convictions and sentences and remand for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,497 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on November 14, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this _____ day of November, 2003, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Craig A. Johnston